Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

IVY MASON, on her own behalf and on behalf of those similarly situated,

Petitioner,

v.

JOHN HAMILTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH J. FALK
Counsel of Record
INDIANA CIVIL LIBERTIES UNION
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The Social Security Act, 42 U.S.C. § 407, prohibits a creditor from utilizing any legal process to take an individual's Social Security benefits. Is this provision violated where a state psychiatric institution becomes a representative payee of a confined individual and utilizes the individual's Social Security proceeds to reimburse itself for bills owing due to the individual's institutionalization without the person's knowing consent?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were petitioner, Ivy Mason, on her own behalf and on behalf of a certified class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class is defined as:

> all past, present, and future mentally impaired recipients of Social Security benefits in Indiana who are institutionalized in Indiana state mental health institutions.

The respondents below were Peter Sybinski, in his official capacity as Secretary of the Indiana Family and Social Services Administration and Janet Corson, in her official capacity as Director of the Division of Mental Health.

The petitioner on appeal, and the certified class, are identical. Ms. Corson remains in her position as Director of the Division of Mental Health. John Hamilton is the current Secretary of the Indiana Family and Social Services Administration.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner herein respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated February 11, 2002, is reported at 280 F.3d 788 (7th Cir. 2002) and is reprinted in the Appendix at pages 1a through 11a. No petition for rehearing was filed. The decision of the trial court is not reported although it can be found at 2001 WL 619389 (S.D.In. 2001). The Judgment is reprinted in the Appendix at pages 12a through 13a and the trial court's Order on Cross Motions for Summary Judgment is reprinted in the Appendix at pages 14a through 36a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit is dated February 11, 2002. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 407 states, in pertinent part:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

The appointment of representative payees for persons receiving Social Security benefits is governed by 42 U.S.C. § 405(j) which is reprinted in the Appendix at 37a through 49a.

STATEMENT OF THE CASE

A. Basis of Federal Jurisdiction in the District Court

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 because of the presentation of a federal question.

B. Statement of the Facts and Legal Background

If the Social Security Administration determines that a recipient is unable to manage his or her funds, a representative payee will be appointed for the individual. 42 U.S.C. § 405(j), 20 C.F.R. § 404.2010. A payee may be appointed for a legally competent recipient as well as for a recipient who has been found to be incompetent. 20 C.F.R. § 404.2010(a). Categories of preferred payees for adult recipients are established as follows: legal guardian or spouse or other relative; a friend who has custody of the recipient; a public or nonprofit agency or institution which has custody; a private institution which has custody; and other persons who are qualified and willing to serve as a payee. 20 C.F.R. § 404.2021(a).

The representative payee is required to utilize the Social Security payments only for the "use and benefit" of the beneficiary "in a manner . . . he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary." 20 C.F.R. § 404.2035. The payee may use the funds to pay for current maintenance which, in the case of an institutionalized person "includes the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the institution." 20 C.F.R. § 404.2040(b).

Generally, a creditor of a beneficiary cannot become a payee. 42 U.S.C. § 405(j)(2)(C)(i)(III). However, an exception is made if the creditor is also a relative who resides

with the recipient, a legal guardian, or a facility licensed under State or local law. 42 U.S.C. § 405(j)(2)(C)(iii).

Indiana operates a number of institutions for persons who are either mentally ill or developmentally disabled. (Appendix [hereinafter "App."] 15a). An Indiana resident who is lawfully placed into one of the institutions, either voluntarily or involuntarily, is entitled to care and maintenance there regardless of ability to pay. (IND. CODE § 12-24-5-4; App. 16a). However, persons who are placed into the institutions are liable for the cost of their treatment and care. (IND. CODE § 12-24-13). They are generally presented a form to sign when they enter the institution informing them of that fact. (App. 4a). They are not told that they will be given treatment regardless of whether or not they pay their bill to the State. (*Id.*). In Indiana, an involuntary commitment is not a determination of legal incompetence and, unless otherwise adjudicated incompetent, the committed person retains the legal ability to exercise all rights, including the right to execute instruments and dispose of property. (IND. CODE §§ 12-26-2-8, 12-27-2-3).

Indiana state hospitals are sometimes appointed as representative payees for institutionalized recipients. (App. 17a). The recipients are notified that a payee has been appointed. However, the payees do not give any sort of permission for their Social Security to be taken by the institution to pay for their care and maintenance. (App. 18a). Nor are they told that they will be given care and treatment, regardless of whether payment is received by the institution and that they are therefore not required to use their Social Security benefits to pay for the cost of their care in the institution. (*Id.*). Nor are they informed

that their Social Security is exempt from any legal process. (App. 20a). Once a state hospital is appointed as payee, the recipients' benefits are placed into an account from which a portion is paid to the person and the remainder is paid towards the cost of institutional maintenance. (App. 17a-18a).

Petitioner Ivy Mason has been periodically involuntarily committed to Richmond State Hospital ("RSH"), an Indiana psychiatric hospital. (App. 18a). In 1998 Ms. Mason was awarded Social Security survivor's benefits retroactive to 1989 as the survivor of her deceased father. (App. 19a). In addition to being notified of her monthly Social Security benefit of $618, she was also informed that she would be receiving a check for $34,408.73 which represented Social Security benefits owing to her from June of 1989 through April of 1999. (*Id.*) The Social Security Administration notified Ms. Mason that it was appointing RSH as her representative payee. (*Id.*) RSH, the representative payee, was allowed to take $25,942.73 of this sum to reimburse itself for her outstanding bill for her care and maintenance at RSH. (*Id.*). Additionally, RSH takes portions of her monthly Social Security benefits and applies them to her bill. (Complaint ¶ 39; Answer ¶ 39). At no time was Ms. Mason informed that her Social Security was not subject to legal process or that she would be treated regardless of whether payment of her bill was made with the Social Security benefits. (App. 20a).

C. Proceedings Below

This case was submitted to the district court on cross-motions for summary judgment. Ms. Mason argued that 42 U.S.C. § 407, which prevents the alienation of Social Security proceeds, prohibited a state institution from taking an individual's benefits to satisfy outstanding obligations unless the patient gives her voluntary consent to this transfer. In order for there to be voluntary consent, the patient must be informed that Social Security is totally exempt from legal process and that the institution will provide services regardless of whether or not the patient consents to the use of her money to pay her bill. Absent this, there is no voluntary consent to the seizure of the Social Security and the taking of the proceeds by the institution represents "other legal process" prohibited by 42 U.S.C. § 407. Ms. Mason also argued that the taking of the Social Security benefits without providing the above information to the recipient also violated due process. The trial court disagreed, and, in granting summary judgment for the respondents, held that since RSH was a representative payee its action in reimbursing itself from Ms. Mason's and the class' Social Security benefits was not "other legal process" and therefore violated neither Section 407 nor due process.

In affirming the district court, the Seventh Circuit acknowledged that this Court's prior decisions, *Bennett v. Arkansas*, 485 U.S. 395 (1988) and *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973), hold that a state cannot generally involuntarily take Social Security benefits to reimburse itself for the care and maintenance of recipients. However, the Seventh Circuit found that if the state is acting as a representative payee, it has the right to

reimburse itself to pay for the care and maintenance of recipients at state institutions. In this situation the reimbursement is not "other legal process" and does not implicate due process.

ARGUMENT

Reasons for Granting the Petition

Plenary review is appropriate in this case for two reasons. First, the decision of the Seventh Circuit decides an important federal question which directly conflicts with the recent decision of the Washington Supreme Court in *Guardianship Estate of Keffeler v. State of Washington*, 32 P.3d 267 (2001), *pet. for cert. filed*, 70 U.S.L.W. 3616 (U.S. March 14, 2002) (No. 01-1420). Second, although this Court has not directly ruled on the statutory issue presented in this case, its prior decisions in *Bennett* and *Philpott* establish the relevant law and the Seventh Circuit's decision conflicts with these relevant decisions.

I. The Seventh Circuit's decision conflicts directly with a decision of the Washington Supreme Court

In *Keffeler*, a class of children in foster care receiving Social Security or Supplemental Security Income benefits claimed that the Washington Department of Social and Health Services (hereinafter "DSHS") violated 42 U.S.C. § 407 by becoming their representative payees and by then using the benefit proceeds to reimburse itself for the cost of the children's foster care. As in this case, the children had to be provided care by the State, regardless

of any payment or reimbursement. 32 P.3d at 269. The Washington Supreme Court recognized that 42 U.S.C. § 407 "forbids creditor access to Social Security benefits." 32 P.3d at 273. The court noted that federal regulations, 20 C.F.R. § 404.2021, demand that the representative payee act in the recipient's interest and that any beneficiary of Social Security would be better off with a payee other than DSHS since the foster care services would be provided regardless of payment. 32 P.3d at 275.

The court noted that there was nothing inherently wrong with DSHS becoming the payee, but that its payee status did not give it permission to reimburse itself from the children's benefits. 32 P.3d at 277.[1] The court recognized that federal regulations allowed the payee to use the benefits to pay current expenses of the children. *See*, 20 C.F.R. §§ 404.2035(a), 404.2040; 32 P.3d at 278. However, the court found that using the money for the actual care and maintenance of the children:

> is significantly different from using the money to reimburse the state for payments it made for the care and maintenance of the foster child –

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[1] In reaching this conclusion, the court noted that the 8th Circuit had correctly determined in *King v. Schafer*, 940 F.2d 1182, 1185 (8th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992), that the process for appointing a protective payee was not "other legal process" in violation of 42 U.S.C. § 407. *Keffeler*, 32 P.3d at 277. "There is nothing ipso facto wrong with DSHS applying to become the representative payee for certain foster children, as § 405(j) and the SSA's accompanying regulations explicitly contemplate. We may even agree that the representative payee application is not 'other legal process.' But is it equally clear that the reimbursement process *is* 'other legal process.' " *Id.* (Court's emphasis).

> especially when that payment to the state cannot be legally compelled and, moreover, could be used or conserved for other special needs of the child.

32 P.3d at 278.

Given this, the Washington Supreme Court concluded that when DSHS reimbursed itself from the Social Security proceeds it was acting as "a creditor, or, if not a creditor, then at least committed to a creditor-type action that is preempted by the 'broad bar' of § 407(a)." 32 P.3d at 278. The practice, therefore, was unlawful.

The Seventh Circuit's decision in this case reached the diametrically opposite conclusion than that reached by the Washington Supreme Court. Both cases sought to answer the question of whether the government could serve as a representative payee and reimburse itself for the cost of caring for Social Security recipients in a situation where the recipient would receive services regardless of whether the government received payment or not. In answering this question, the two courts reached contrary conclusions. Whereas the Washington court took pains to find that payee status did not alter the state's status as a creditor, the Seventh Circuit found that the payee status insulated the state from being found to be a creditor as long as the Social Security proceeds were used for the use and benefit of the recipient. (App. 9a). The Washington court held that using Social Security proceeds to reimburse the state in a situation where services would be provided regardless of payment was not in the best interests of the recipient, as required by federal regulations. The Seventh Circuit reached the opposite conclusion. (App. 9a-10a). Ultimately, the Seventh Circuit found that

this involuntary reimbursement of money owing to it was not "other legal process" prohibited by 42 U.S.C. § 407. The Washington Supreme Court reached the contrary conclusion. The two cases cannot be reconciled.[2] This Court should grant plenary review to resolve this conflict.

II. The Seventh Circuit's conclusion that 42 U.S.C. § 407 is not violated here is an erroneous determination of an important question of federal law which conflicts with relevant decisions of this Court

The issue in this case is extremely important. Rather than being able to save Social Security proceeds so that, for example, the patient can have money for future living expenses out of the institution, the State of Indiana takes the money and uses it to reimburse itself for services which would be provided without any payment at all. The logic of the Seventh Circuit's decision allows child welfare authorities to take benefits which could be used to provide children with services or other items they could or would not otherwise receive, and to instead use the benefits to reimburse the State for the care it would provide to the children regardless of payment. The Seventh Circuit's decision is in conflict with this Court's decisions in *Philpott* and *Bennett* and is erroneous.

In *Philpott, supra,* a New Jersey public welfare agency advanced monthly disability assistance to a beneficiary

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[2] The Seventh Circuit failed to mention *Keffeler* in its decision.

who was required, as a condition of the receipt of benefits, to sign an agreement to reimburse the agency from Social Security proceeds when they were received. In finding that this involuntary reimbursement for aid provided by the public agency violated 42 U.S.C. § 407, the Court noted that "[o]n its face, the Social Security Act in § 407 bars the State of New Jersey from reaching the federal disability payments." 409 U.S. at 415. This Court noted further that it could "see no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor." *Id.* at 416.

The fact that a state could not become a preferred creditor and take Social Security when it renders services to an individual was reemphasized by this Court in *Bennett v. Arkansas, supra.* Here the state attempted to attach Social Security benefits of incarcerated individuals in order to defray the costs of their imprisonment. But, this Court held that § 407 "unambiguously rules out any such attempt to attach Social Security benefits." 485 U.S. at 397. In reaching this conclusion, this Court "reject[ed] the State's attempt to avoid this conclusion by arguing that the federal statute contains an 'implied exception' that would allow attachment of otherwise exempted federal payments simply because the State has provided the recipient with 'care and maintenance.' " *Id.*

Following these decisions, Courts of Appeals, including the Seventh Circuit in an earlier opinion, repeatedly reemphasized that a state which had custody of a Social Security recipient could not elevate itself into the position of a "preferred creditor" by taking portions of the person's benefits, without consent, to reimburse itself for the

cost of the person's care. Thus, in *Tidwell v. Schweiker*, 677 F.2d 560 (7th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), the court found that a form which the State of Illinois had institutionalized mental patients sign, giving the State permission to take portions of their Social Security to pay the costs of their support, was "other legal process" which violated § 407. The court noted that only if the party was informed that he or she would receive treatment regardless of whether the form was signed and that the form covered Social Security benefits which were not otherwise subject to seizure would the alienation of the Social Security benefits then be deemed to be voluntary and not a violation of § 407. In *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989), the court found that the State of Washington's procedure whereby Social Security proceeds were withdrawn to pay for the costs of hospitalization was also prohibited by § 407. In *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995), a class of institutionalized psychiatric patients in California state hospitals sued to enjoin the practice of California deducting Social Security benefits from the patients' hospital trust accounts to pay for the cost of their care. Although, unlike *Brinkman*, the patients were asked to sign an authorization form before the transfer, the form did not explain that the patients could refuse to apply Social Security to their costs of care and the benefits could not otherwise be taken. 56 F.3d at 1166. The court found that this practice represented "other legal process" and was therefore precluded by § 407.

> The nonassignment provision was not designed to preclude use of only the judicial process to obtain Social Security benefits. Rather, § 407(a) is designed "to protect social security beneficiaries and their dependents from the claims of

> creditor." . . . The cramped reading of § 407 California urges would enable the state to obtain Social Security benefits through procedures that afford less protection than judicial process affords.

56 F.3d at 1167. (Internal citation omitted).

The Seventh Circuit found that the lessons of *Philpott* and *Bennett*, as explicated by the above Court of Appeals' cases, did not apply because the case at bar, unlike the other cases, involved patients who had representative payees. (App. 7a).[3] This misses the lesson and essential principles of *Philpott* and *Bennett*; Section 407 is violated when the State elevates itself to a position of "preferred creditor" with regard to an institutionalized Social Security recipient. A state, as protective payee, which uses the Social Security proceeds to pay a debt owing to it in a situation where services would otherwise be provided for free and in a situation where the recipient is never informed of this fact and is never informed that the Social Security proceeds could not otherwise be taken, is no less a creditor than the State agency in *Bennett* and the State in

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[3] Although not specifically mentioned by the *Crawford* court, it appears clear that the class there, and thereby the court's holding that the attempted taking of the benefits violated § 407, included both recipients with and those without representative payees. *See*, 56 F.3d at 1162, note 1 (defining the class in the case as including all hospitalized patients receiving Social Security benefits and noting a separate sub-class of those for whom the State is not the representative payee. The relief in the case appears to be for the benefit of the class.)

Philpott. The Seventh Circuit's decision therefore conflicts with prior decisions of this Court.

CONCLUSION

The petition for a writ of *certiorari* should therefore be granted.

KENNETH J. FALK
Counsel of Record
INDIANA CIVIL LIBERTIES UNION
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059

Attorney for Petitioners

In the

United States Court of Appeals

for the Seventh Circuit

No. 01-2497

IVY MASON, on her own behalf and
on behalf of those similarly situated,

Plaintiff-Appellant,

v.

PETER SYBINSKI, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. IP 00-0988-C-M/S – **Larry J. McKinney**, *Chief Judge.*

ARGUED JANUARY 9, 2002
DECIDED FEBRUARY 11, 2002

Before FLAUM, *Chief Judge*, and HARLINGTON WOOD, JR., and EASTERBROOK, *Circuit Judges.*

FLAUM, *Chief Judge.* Ivy Mason, on behalf of herself and a class of past, present, and future mentally impaired Social Security recipients who are institutionalized in Indiana state mental health institutions, brought action against the state of Indiana. The class sought declaratory and injunctive relief to prevent the state hospitals, appointed by the Social Security Administration ("SSA" or "the Administration") as representative payees, from

deducting a portion of the recipients' Social Security benefits to pay for institutional maintenance without their voluntary consent. The class contends that the state hospitals' actions violate the anti-attachment provision of the Social Security Act ("the Act") as well as procedural due process. The district court granted summary judgment in favor of the state on all claims. Mason, on behalf of the class, now appeals. For the reasons stated herein, we affirm the decision of the district court.

I. Background

The SSA, when it determines that a recipient is unable to manage or direct management of her own Social Security benefits, appoints a representative payee to do the job for her. 42 U.S.C. §405(j) (2001); 20 C.F.R. §404.2001 (2000). Representative payees are subject to a number of Social Security regulations created to prevent misuse or abuse of the funds. The appointed payee must use the payments received only for the "use and benefit" of the beneficiary, "in a manner . . . he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary." 20 C.F.R. §404.2035. The regulations define "for the use and benefit" of the recipient to include costs of current maintenance, 20 C.F.R. §404.2040(a)(1), and define "current maintenance" to include customary charges by a state, federal, or private institution where the beneficiary is receiving care. 20 C.F.R. §404.2040(b). The Act states, moreover, that a creditor who provides the beneficiary with goods or services for consideration cannot be that person's representative payee except, inter alia, when that creditor is a state-

licensed or certified care facility. 42 U.S.C. §405(j)(2)(C)(i)(III); 42 U.S.C. §405(j)(2)(C)(iii).

The regulations set forth an order of preference in selecting a representative payee for institutionalized beneficiaries. If a legal guardian, spouse, other relative, or friend who demonstrates a strong concern for the recipient exists, the SSA will generally appoint that person to be the payee. If not, however, the Administration's preference is to appoint the state institution where the recipient resides. 20 C.F.R. §404.2021(a).

When the SSA appoints a state hospital as representative payee, it provides notice to the hospital that it must use the payments for the benefit and care of the recipient. The Administration also provides notice to the beneficiary herself that a payee has been appointed and that she has the right to appeal that appointment. The recipient is told that the representative payee will be responsible for managing her benefits. In Indiana, when a state hospital is appointed payee, it verbally informs the beneficiary that her benefits may be used to pay for the cost of their care. Also, the SSA generally informs the beneficiary (and did so, by letter, in Mason's case) that the hospital, as payee, will apply part of the money toward its bill.

After receiving a recipient's benefit payment, the hospital deposits the money into a trust account. According to guide lines and specific instruction from the SSA, the hospital provides the recipient with spending money for bills, clothing and other reasonable expenses. It also deducts a portion of the benefits to pay for institutional costs. The hospital does not obtain written consent from

the beneficiary to allow the state to apply the benefits to the cost of institutionalization.

Under Indiana law, residents of hospitals and institutions are liable for the cost of their treatment and care. Ind.Code § 12-24-13 (2001). If a person is legally admitted to a state institution, however, she is entitled to care and maintenance there, regardless of her ability to pay. Ind.Code § 12-24-5-4. When a patient is admitted, Indiana mental health institutions generally show her a notification of liability. After the hospital is appointed as representative payee for a patient, however, it does not inform her that she will be treated at the hospital even if she does not use her Social Security benefits to pay for the cost.

Ivy Mason, the class representative, is mentally disabled and has been a resident patient at Richmond State Hospital ("RSH") from July 7, 1992 to January 14, 1993; from October 4, 1994 to June 18, 1999; and from December 4, 1999 to the present. Upon her second and third admissions, pursuant to Indiana law, she signed a "Notification of Liability for Cost and Care of Treatment." From at least January 1998 until her second release, and for the entirety of her current stay at the hospital, RSH has been the representative payee for her Social Security benefits. On January 29, 1998, the SSA awarded Mason Social Security survivor's benefits retroactive to 1989 and informed her that she would be getting both ongoing monthly benefits in the sum of $618 as well as a lump-sum check for $34,408.73 for her back benefits. The SSA told both Mason and RSH that $25,942.73 of the lump-sum check was to be applied to her outstanding hospital bill. RSH did so and, under SSA guidance, also uses a portion of her monthly

benefits check (as of the time of discovery, about $518) to pay her bill (which, again at the time of discovery, was approximately $7,170 per month). As of May 31, 2000, the bill for Mason's care at RSH totaled $412,070.98.

II. Discussion

We review the district court's grant of summary judgment *de novo*, construing all of the facts and reasonable inferences that can be drawn from those facts in favor of the nonmoving party. *See Central States, Southeast & Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 894 (7th Cir. 2001). A grant of summary judgment is appropriate if the pleadings, affidavits, and other supporting materials leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

a. 42 U.S.C. §407

The class argues that, although the Social Security Act does allow state hospitals and institutions to act as representative payees, those hospitals cannot apply a resident recipient's benefits to its own costs, absent that beneficiary's consent, without violating the anti-attachment provision of the Act. That provision provides:

> The right of any person to any future payment under this subchapter will not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal

process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. §407

In short, the class members contend that the state's application of recipients' benefits to their cost of care without their specified consent is a form of "other legal process." In support of this argument, they attempt to extend a line of cases that interprets broadly the §407 prohibition against attachment to include the situation where, as here, the state acts as representative payee. In *Philpott v. Essex County Welfare Bd.*, the Supreme Court held that states are not in a preferred position compared to other creditors; they cannot subject benefit payments to any legal process. 409 U.S. 413 (1973). Similarly, the Supreme Court in *Bennett v. Arkansas* held that the anti-attachment provision applies to state creditors, such as hospitals, that have provided the beneficiary with care and maintenance. 485 U.S. 395 (1988). This Court has held that when a state hospital asked a resident Social Security recipient to sign a form allowing the state to accumulate her benefits into a trust fund it could use to pay for the cost of care and maintenance, and that form did not inform the patient that it was revocable or that she would be treated regardless of whether she signed it, the state violated the Act's anti-attachment provision. *Tidwell v. Schweiker*, 677 F.2d 560, 567 (7th Cir. 1982). If the form were signed voluntarily – that is, if the beneficiary were informed that the form was revocable and that she would receive treatment even if she did not sign it – then no violation would have occurred. *Id.; see also Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995) (holding that a state may apply a patient's

benefits to the cost of her care only if she has provided consent.)

The class relies heavily on *Tidwell* to claim that Indiana, in the instant case, unlawfully subjected institutionalized recipients' Social Security benefits to legal process by taking a portion of those benefits without their voluntary consent. The holding of *Tidwell*, however, as well as those of *Philpott* and *Bennett*, did not involve the situation where the state acted as representative payee. In this case, the district court held, and we agree, that a representative payee's decision to apply benefits to the recipient's cost of care in a state institution does not amount to other legal process – even when the payee is the state itself. We decline to extend the *Tidwell* holding to cover such a circumstance. Moreover, the Supreme Court's decisions in *Philpott* and *Bennett*, which hold that just as other creditors do, a state creditor violates the anti-attachment provision when it attaches or subjects to other legal process a recipient's benefits – simply do not apply here because no attachment or legal process took place. A properly appointed representative payee's responsible management of a Social Security recipient's benefits cannot amount to "other legal process," regardless of whether that payee is an arm of the state.

The Social Security Act and regulations, as outlined above, permit – in fact, encourage – state institutions to act as representative payees and, more pertinently, when acting as payees, to apply recipients' benefits to the cost of their care and maintenance at a state institution where they reside. 20 C.F.R. §404.2021; §404.2035; §404.2040. "Section 407 was not intended to outlaw a procedure

expressly authorized by the Social Security Administration's own regulations." *King v. Schafer*, 940 F.2d 1182, 1185 (8th Cir. 1991). Generally, the Social Security Act prohibits creditors from acting as representative payees. 42 U.S.C. §405(j)(2)(C)(i)(III). It does so for the same reason that it includes the anti-attachment provision: to protect beneficiaries' Social Security income from the reach of creditors. The Act explicitly excepts state institutions from this prohibition, 42 U.S.C. §405(j)(2)(C)(iii), suggesting first that Congress did not intend money management by representative payees who are also creditors to be included in the ambit of the anti-attachment provision (otherwise the separate prohibition would be redundant), and second that it considered the balance of interests and decided – without noting special restrictions – that, despite the need to protect recipients' benefits from creditors, state institutions should be allowed to act as representative payees.

Tidwell announced the rule that when a state hospital, not acting as representative payee, applies the recipient's benefits to the cost of her care, that action amounts to other legal process unless the recipient gave voluntary consent to remove it from the purview of §407. *Tidwell*, 677 F.2d at 568. We find, for the reasons stated above, that the state's actions in this case do not constitute "execution, levy, attachment, garnishment, or other legal process," and therefore are always outside the ambit of the anti-attachment provision. The question of whether the resident recipients must give voluntary consent, then, is beside the point. Because the state's actions do not amount to other legal process, the recipient's consent is unnecessary.

The rationale behind the anti-attachment provision is to "protect social security beneficiaries and their dependents from the claims of creditors." *Fetterusso v. New York,* 898 F.2d 322, 327 (2d Cir. 1990). We do not deny the importance and validity of such protection, even when the "creditor" is the state hospital providing care and maintenance to the recipient. *See, e.g., Bennett,* 485. U.S. 395; *Tidwell,* 677 F.2d 560. But, without straying from the goal of protecting the recipients' benefits, Congress and the Social Security Administration saw fit to allow state hospitals to act as representative payees when certain safeguards were met: the payee must use the money for the use and benefit of the recipient, which may include paying for the cost of her current care and maintenance, 20 C.F.R. §404.2035, and the SSA must provide notice to the recipient that it intends to name a representative payee, who that payee will be, and that the recipient has the right to object to and appeal the decision. U.S. Const. amend. XIV, *Tidwell,* 677 F.2d at 564. The class does not contend that the above criteria are not being met. Indiana hospitals follow carefully the SSA's guidelines regarding use of recipients' benefits. They apply a portion of the money to recipients' personal needs – clothing, spending money, and the like – and only then do they apply a portion of the benefits to institutional costs. There is no evidence that the beneficiaries' moneys are left unprotected. Congress has never indicated that representative payees need to obtain beneficiaries' consent before applying their Social Security income in any given manner, so long as that application is for the use and benefit of the recipient. We will not now narrow the discretion that Congress explicitly granted representative payees to

use the money "in a manner . . . he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary." 20 C.F.R. §404.2035.

b. Due Process

The class further argues that when a state hospital, acting as representative payee, applies a recipient's Social Security benefits to the cost of her institutional care without notice or opportunity to be heard, it violates the patient's right to procedural due process under the Fourteenth Amendment. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254 (1970). The relevant questions here are: 1) whether the state deprived class members of a protected property interest; and 2) if so, what process is due. *See Brokaw v. Mercer County,* 235 F.3d 1000, 1020 (7th Cir. 2000). Although the Social Security Administration gives proper notice and opportunity to object when it appoints a representative payee, *Tidwell,* 677 F.2d at 564, the class contends that when the state, as payee, applies the recipient's benefits to its own costs, further notice and opportunity to object are required because a separate deprivation occurs. The SSA notice, the class claims, does not inform recipients that the payee may use the benefits to pay for the cost of their care or that they will be treated at the institution even if they do not consent to their benefits being applied to its cost. We cannot agree with this logic.

The notice provided by the SSA informs Social Security beneficiaries that their appointed payee will have the authority to manage their receipts so long as they do so in a manner consistent with federal law and for the use and benefit of the recipient. By accepting the appointment of a

representative payee, a beneficiary, while retaining some right to her property, does not retain the right to make individual management decisions regarding her benefits unless she utilizes the SSA's appeal process. As discussed above, the state hospitals in question followed all relevant laws and regulations. We find that the state's money management decisions while serving as representative payee do not constitute an additional deprivation of a protected property interest. The threshold question is not answered in the affirmative; therefore, no due process violation has occurred.

III. Conclusion

For the reasons stated herein, we AFFIRM the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IVY MASON, on her own behalf and on behalf of those similarly situated,	)	
Plaintiffs,	)	
vs.	)	IP 00-988-C-M/S
PETER SYBINSKI, in his official capacity as Secretary of the Indiana Family and Social Services Administration, and JANET CORSON, in her official capacity as Director of the Division of Mental Health,	)	
Defendants.	)	

ENTRY OF JUDGMENT

Through an order issued the 15th day of May, 2001, this Court granted summary judgment in favor of Defendants and against Plaintiffs. A final judgment is entered accordingly. Plaintiffs shall take nothing by way of their complaint.

DATED this 15th day of May, 2001.

/s/ Laura A. Briggs
CLERK
LAURA A. BRIGGS, CLERK
United States District Court
Southern District of Indiana

By: /s/ _____
Deputy Clerk

Distributed to:

Jacquelyn B. Suess
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202

Laureanne Nordstrom
Office of the Atty. General
Indiana Government Center South,
5th Floor, 402 West Washington St.
Indianapolis, IN 46204-2770

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IVY MASON, on her own behalf and on behalf of those similarly situated,	)	
Plaintiffs,	)	
vs.	)	IP 00-0988-C-M/S
PETER SYBINSKI, in his official capacity as Secretary of the Indiana Family and Social Services Administration, and JANET CORSON, in her official capacity as Director of the Division of Mental Health,	)	
Defendants.	)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on the Cross Motions for Summary Judgment of Plaintiff Ivy Mason, on her own behalf and on behalf of those similarly situated ("Mason"), and Defendants Peter Sybinski, in his official capacity as Secretary of the Indiana Family and Social Services Administration, and Janet Corson, in her official capacity as Director of the Division of Mental Health. Richmond State Hospital ("RSH") is Mason's representative payee for Social Security benefits. Mason filed this lawsuit challenging RSH's practice of deducting a portion of her Social Security benefits without her consent to pay for the costs of her maintenance. Mason claims RSH's actions violated the "anti-assignment" provision of the

Social Security Act, which is found at 42 U.S.C. § 407. She also claims that RSH violated her right to procedural due process under the Fourteenth Amendment, and took her property without just compensation in violation of the Fifth Amendment. The State denies that representative payees are required to obtain beneficiaries' consent before using such benefits for their maintenance. The parties have submitted fully-briefed motions that are ripe for resolution.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. INDIANA'S SYSTEM OF MENTAL HEALTH CARE

Mason represents a class of individuals defined as "all past, present and future mentally impaired recipients of Social Security benefits in Indiana who are institutionalized in an Indiana state mental health institution."[1] Indiana operates six mental health hospitals: RSH, Madison State Hospital, Evansville State Hospital, Evansville Children's State Hospital, Logansport State Hospital, and Carter State Hospital. Indiana also operates two developmental disability centers: a Muscatatuck center and a Fort Wayne center. *Kent Farr Dep.* at 5.[2]

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[1] Although Mason does not discuss it, the Court assumes that all class members had representative payees for their Social Security benefits.

[2] Because plaintiffs have sued the defendants in their official capacities, they are in effect suing the State of Indiana. Therefore, the Court will refer to the "State" as the defendant in this matter.

In Indiana, a resident is entitled to care and maintenance in a state institution if he or she is legally admitted to the state institution. Thus, individuals lawfully admitted to state mental hospitals and developmental disability centers are entitled to care and maintenance in those institutions, regardless of their ability to pay. *Id.; Farr Dep.* at 33, 40.

B. THE SOCIAL SECURITY ADMINISTRATION'S ABILITY TO APPOINT A REPRESENTATIVE PAYEE FOR THE RECEIPT OF BENEFITS

The Social Security Administration ("SSA") decides whether it should appoint a representative payee, and it will do so if it determines that a beneficiary is not able to manage or direct the management of benefit payments in his or her interest. *Farr Dep.* at 7; 20 C.F.R. § 404.2001 (2000). The SSA has regulations and policies with respect to the duties and responsibilities of representative payees. 20 C.F.R. § 404.2035 (2000). One of those regulations provides, in pertinent part, that a representative payee generally has the responsibility to use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines to be in the best interests of the beneficiary. *Id.* The SSA considers payments to have been used for the "use and benefit" of the beneficiary if they are used for the beneficiary's current maintenance. 20 C.F.R. § 404.2040 (2000). If a beneficiary is receiving care in a federal, state, or private institution because of mental or physical incapacity, "current maintenance" includes the customary charges made by the institution, as well as

expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the institution. *Id.*

C. THE STATE OF INDIANA AS A REPRESENTATIVE PAYEE

The SSA sometimes appoints Indiana state hospitals as the representative payees for Social Security recipients who are institutionalized in hospitals. *Farr Dep.* at 17-18. The SSA provides notices to representative payees that Social Security benefits of recipients must be used for the benefit and care of the recipients. *Id.* at 36-37. The SSA also provides notice to the recipients that a representative payee has been appointed, and informs such individuals of the right to appeal such appointment under Social Security procedures. *Id.* at 15-16.

Once a state hospital is appointed as a representative payee for an institutionalized Social Security recipient, the hospital places the recipient's benefits into a trust account. *Id.* at 14, 18.[3] It appears that from that trust account spending money is paid out to recipients and at least a portion of the remainder is applied to institutional maintenance costs. *Id.* at 14. Institutionalized Social Security recipients do not assign their Social Security benefits

[3] Before Social Security benefits of institutionalized individuals are placed into a trust account, the state hospitals inform such individuals that they are liable for the cost of their care in the hospital and verbally inform them that their Social Security benefits may be used to pay for that cost. *Farr Dep.* at 24.

to be used for cost of their care, treatment, or maintenance in a state hospital; rather, portions of such benefits are simply deducted from their trust account to pay for such costs. *Id.* at 37-40.

Upon recipients' admissions or soon thereafter, Indiana mental health institutions routinely require them to sign a state form entitled "Notification of Liability for Cost of Care and Treatment." *Id.* at 30, 32; *Farr Dep. Ex. A.* The State never informs institutionalized Social Security recipients, verbally or in writing, that they are not required to use their Social Security benefits to pay for the cost of their care, maintenance, and treatment in the state hospital. *Farr Dep.* at 27, 41-42. Nor does the State inform such recipients that they will be given treatment, care, and maintenance in the state hospital even if they do not use their Social Security benefits to pay for the cost of such care, treatment, and maintenance. *Complaint* ¶ 42; *Affidavit* ¶ 12; *Farr Dep.* at 41. The State never obtains written consent from institutionalized Social Security recipients or their representative payees to allow the State to apply such recipients' Social Security benefits to the cost of their care, treatment, and maintenance in the state hospital. *Farr Dep.* at 37-38, 42.

D. MASON'S COMMITMENTS TO STATE HOSPITALS

Mason is a mentally disabled individual who has been periodically involuntarily committed to RSH from July 7, 1992, to January 14, 1993; October 4, 1994, to June 18, 1999; and December 4, 1999, to present. *Complaint* ¶ 31. The SSA sent Mason a statement notifying her that

it had decided she needed someone to manager her benefits and that it would send her benefits to a representative payee. *Farr Dep.* at *Ex. F.* The SSA also notified her that it was the duty of the representative payee to use her benefits for her interests, and that it had chosen RSH to be her representative payee. *Id.* Mason signed the statement on December 20, 1999. *Id.*

On January 29, 1998, Mason was awarded Social Security survivor's benefits retroactive to June 1989 as the survivor of her deceased father. *Complaint*, ¶ 36; *Mason Aff.* ¶ 6. SSA informed Mason that, in addition to on-going monthly Social Security benefits in the amount of $618, she would also be receiving a check for $34,408.73 for the Social Security benefit she was owed from June 1989 through April 1999. *Complaint* ¶ 37. On May 30, 2000, SSA informed Mason and RSH that $25,942.73 of the $34,408.73 back payment to her should be applied to her outstanding RSH bill for her care and treatment. *Complaint* ¶ 38.

Upon her October 4, 1994, and December 4, 1999, commitments to RSH, Mason was required to sign a "Notificatoin of Liability for Cost of Care and Treatment" in which she acknowledged that she would be liable for the cost of her care and maintenance at RSH under Indiana law. *Complaint* ¶ 32 and *Attachment A; Farr Dep.* at 33. RSH has already applied some portions of Mason's monthly Social Security benefits to her bill for her care and maintenance at RSH.[4] *Complaint* ¶ 39. Although

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[4] The daily charge for cost of care at RSH was $239 as of August 1, 1998, for a monthly rate of approximately $7,170. As a

Mason signed the Notification of Liability for Cost of Care and Treatment at RSH, she never signed any document consenting to the use of her Social Security benefits for payment for such care and treatment. *Complaint* ¶ 41; *Mason Aff.* ¶ 11; *Farr Dep.* at 56-57. RSH never advised Mason that she would be treated regardless of whether she consented to the payment of her bill with her Social Security benefits, that any consent to such payment was revocable, or that her Social Security benefits were not subject to legal process. *Complaint* ¶ 42; *Mason Aff.* ¶ 12; *Farr Dep.* at 54-55.

II. STANDARDS

A. SUMMARY JUDGMENT STANDARDS

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

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representative payee, the State deducts a percentage of that monthly rate (which apparently amounts to about $518) from a patient's trust account for current maintenance charges. *Farr Dep.* at *Ex. E.*.

> with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but mut instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which she relies. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *Estate of Cole v. Fromm*, 94 F.3d 254,

257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment – even when in dispute. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

B. THE SOCIAL SECURITY ACT

The benefits of the Social Security Act were intended to provide "the claimant and those dependent upon him, as the wage earner, with protection against the economic hardship occasioned by the loss of wages resulting by reason of death, disability or retirement of the wage earner." *Kelbach v. Harris*, 634 F.2d 1304, 1309 (10th Cir. 1980), *citing Califano v. Boles*, 443 U.S. 282 (1980); *Califano v. Jobst*, 434 U.S. 47 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Matthews v. DeCastro*, 429 U.S. 181 (1976). Toward that end, the Act provides that such benefits will be protected from legal process. Specifically, the Act provides that:

> The right of any person to any future payment under this subchapter will not be transferrable or assignable, at law or in equity, and none of

> the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407. The Act's regulations provide that payment of benefits may be remitted to a representative payee, who must "use the payments he . . . receives only for the use and benefit of the beneficiary in a manner . . . he . . . determines, under the guidelines in this subpart, to be in the best interests of the beneficiary." 20 C.F.R. § 404.2035(a) (2000). The regulations further provide that "for the use and benefit of the beneficiary" includes the use for the "beneficiary's current maintenance," 20 C.F.R. § 404.2040(a) (2000). If the beneficiary is institutionalized "because of mental . . . incapacity, current maintenance includes the customary charges made by the institution . . . or expenses for the personal needs which will improve the beneficiary's conditions while in the institution." *Id.* at § 404.2040(b) (2000). With these standards in mind, the Court will now address the parties' arguments.

III. DISCUSSION

A. DID RSH VIOLATE § 407

There is not dispute that RSH, as representative payee of Mason, deducted a percentage of her Social Security benefits to pay for the cost of her maintenance. Mason concedes that SSA was authorized to appoint RSH as a representative payee to receive her Social Security benefits. She claims, however, that RSH's practice of

deducting such benefits violates the "anti-assignment" provision of the Social Security Act. Again, that provision provides that:

> The right of any person to any future payment under this subchapter will not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407. The exemption from legal process created by this section seeks "to protect social security beneficiaries and their dependents from the claims of creditors." *Krieghaunt v. Katz*, 909 F.2d 70, 73 (2nd Cir. 1990), *citing Fetterusso v. State of New York*, 898 F.2d 322, 327 (2nd Cir. 1990). Moreover, the Supreme Court has found that the language of this section is all inclusive and that it "imposes a broad bar against the use of any legal process to reach all Social Security benefits." *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973).

In *Philpott*, an individual named Wilkes applied for assistance from one of New Jersey's welfare agencies, the Essex County Welfare Board. In exchange for receiving assistance, Wilkes was required to sign a reimbursement agreement, which had the effect of a judgment and allowed the Board to obtain reimbursement out of subsequently discovered or obtained assets. *Id.* at 414-415. After receiving assistance from the Board, Wilkes later was awarded lump-sum retroactive disability benefits under the Social Security Act. When Wilkes declined to repay his interim assistance, the Board sued to reach the

bank account into which Wilkes had deposited his benefits check. *Id.* The State argued that Wilkes' state benefits should have been reduced by the amount of federal benefits he received. The Court, relying upon § 407, found "no reason to base an implied exemption from § 407 on that ground. We see nc reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor." *Id.* at 416. *Accord, Bennett v. Arkansas,* 485 U.S. 395, 397 (1988) ("Section 407(a) unambiguously rules out any attempt to attach Social Security benefits.").

The Seventh Circuit has also weighed in on the issue, finding that § 407 prohibited the State of Illinois from applying Social Security benefits to patients' maintenance costs without first obtaining their consent. In *Tidwell v. Schweiker,* 677 F.2d 560 (7th Cir. 1982), *cert. denied,* 461 U.S. 905 (1983), the plaintiffs challenged the statutory and regulatory scheme providing for the payment of Social Security disability benefits to institutionalized mental patients. Plaintiffs' disability benefits were subject to seizure in the following manner: If a patient entering an Illinois institution was determined to be competent, he or she was asked to sign a form (Form 623) that allowed the state to accumulate disability benefits and other assets in a trust fund. *Id.* at 563. When the assets in the fund reached $400, the state could use the surplus to pay the support costs incurred by the patient at the institution. The form did not inform the patients, however, that they would be cared for regardless of whether they signed the form, that the agreement was revocable at any time, or

that the agreement covered Social Security disability benefits, which were not otherwise subject to legal process. *Id.*

The Seventh Circuit found that although the form was revocable, it still remained a transfer or assignment while it was in effect, which violated § 407. *Id.* at 567-568. In addition, the Court was not convinced that it was voluntary because nowhere on the form did it state that a patient would be treated regardless of whether he signed the form or that the agreement was revocable:

> Unless a patient in a DMH institution is advised that he will receive treatment regardless of whether he signs Form 623, that Form 623 is revocable, and that the form covers Social Security benefits not subject to legal process, it cannot be said that Form 623 is voluntary or that the patient retains enough control to remove the agreement from the ambit of section 407."

Id. at 567-568. *Accord, Crawford v. Gould*, 56 F.3d 1162, 1167 (9th Cir. 1995) (noting that a state "can apply a patients' Social Security benefits to the cost of institutionalized care only if the patient has provided consent. Absent consent a state has no valid means of obtaining an institutionalized person's Social Security benefits.").

It is undisputed that RSH did not obtain Mason's consent before deducting her benefits to pay her maintenance costs, nor did it notify her that she was entitled to treatment even if she did not use her benefits in such a manner. Both parties agree, however, that the SSA has the authority to appoint a representative payee if it determines that the beneficiary is not able to manage or direct

the management of benefit payments in his or her interest. 20 C.F.R. § 404.2001 (2000). The SSA may appoint a representative payee, for example, where it has information that the beneficiary is legally incompetent or mentally incapable of managing benefit payments. 20 C.F.R. § 404.2010 (2000). In this case, that is exactly what happened. After determining that Mason was unable to manage her benefits, the SSA appointed RSH as her representative payee. Whenever the SSA intends to make a representative payment and to name a payee, it notifies the beneficiary or the individual acting on his or her behalf of its proposed action. 20 C.F.R. § 404.2030 (2000). The SSA notifies the beneficiary that it plans to name a representative payee and who that payee will be. It also asks the beneficiary to contact it if he or she objects to either proposed action. The beneficiary also has an opportunity to request a reconsideration of the SSA's determinations. 20 C.F.R. § 404.2030 (2000). Mason does not dispute that she received such notice.

As Mason's representative payee, RSH had the responsibility to use the payments it received only for the use and benefit of Mason and in a manner and for the purposes it determined to be in Mason's best interests. 20 C.F.R. § 404.2035 (2000). The SSA considers the payments it certifies to RSH to have been used for the "use and benefit" of Mason if they are used for her current maintenance, which includes the customary charges made by RSH. 20 C.F.R. § 404.2040(a)(b) (2000). That is what RSH did in Mason's case – it deducted a percentage of her benefits and applied it to her current maintenance costs.

Mason does not challenge SSA's appointment of RSH as her representative payee. Nor does she challenge

RSH's ability to use her benefits the cost of her maintenance. Instead, relying upon *Tidwell*, she claims that before using the benefits for such purpose, RSH was required to get her consent. Because it failed to do so, Mason contends that the State has violated § 407.

1. Did RSH Subject Mason's Benefits To "Other Legal Process?"

The State initially argues that Mason has not shown that RSH executed, levied, attached, garnished, or otherwise subjected her Social Security benefits to legal process, which is all that § 407 prohibits. Mason disagrees, claiming that RSH's practice of deducting her benefits without her consent amounts to "other legal process." Mason relies upon *Crawford*, 56 F.3d at 1162, for the proposition that "other legal process" applies to actions beyond simply the judicial process. *See Mason's Reply Brief* at 13, n.1. In *Crawford*, however, the plaintiffs were patients in psychiatric hospitals, but they did not have representative payees. The State of California asked patients to sign a form that authorized it to deposit their money, including Social Security benefits, into a deposit fund. The form also gave the hospital trust officer authority to make withdrawals from the patients' accounts. *Id.* at 1163-1164. If a patient refused to sign the authorization form, the State still followed the deposit and withdrawal procedures. It would simply provide nonconsenting patients with a "Notice of Intended Withdrawal," which informed them of the amount the hospital would be withdrawing monthly from the trust account. *Id.* at 1164. At least five of the six named plaintiffs had either refused

to sign the authorization or had subsequently revoked their authorization.

The State of California argued that the term "other legal process" contained in § 407 encompassed only judicial process. The Ninth Circuit disagreed, noting that its conclusion that "other legal process" included the procedure California was using to deduct Social Security benefits was consistent with the purpose of § 407:

> The nonassignment provision was not designed to preclude use of only the judicial process to obtain Social Security benefits. Rather, § 407(a) is designed 'to protect social security beneficiaries and their dependents from the claims of creditors.' *Fetteruso v. New York*, 898 F.2d 322, 327 (2nd Cir. 1990). The cramped reading of § 407 California urges would enable the state to obtain Social Security benefits through procedures that afford less protection than judicial process affords.

Id. at 1166. As already discussed, the *Tidwell* court similarly found that the State of Illinois' practice of deducting benefits from competent patients without getting their consent fell within the ambit of § 407. *Tidwell*, 677 F.2d at 567-568.

The Court agrees that "other legal process" goes beyond the traditional legal or judicial process. Otherwise, as the Ninth Circuit pointed out, states may be able to obtain benefits through procedures that afford less protection than that which is found in the judicial process. But the Court is not persuaded that in cases where the SSA has appointed a state as a representative payee, that state's decision to apply benefits to the cost of a

beneficiary's current maintenance amounts to "other legal process." Otherwise, the federal regulations permitting RSH to be a representative payee and allowing it to reimburse itself for the cost of current maintenance would make no sense. *See King v. Schafer,* 940 F.2d 1182, 1185 (8th Cir. 1991), *cert. denied sub nom., Crytes v. Schafer,* 502 U.S. 1095 (1992) ("Section 407 was not intended to outlaw a procedure expressly authorized by the Social Security Administration's own regulations."). Mason's circumstances are different from those involved in *Crawford* and *Tidwell,* where the states were extracting benefits from unwilling, competent beneficiaries. Here, RSH is Mason's representative payee, and is charged with the obligation of using her benefits in her best interests. In so doing, RSH determined that it should apply a portion of her benefits to pay for her maintenance, an act that is fully authorized by the SSA's regulations. The Court concludes that RSH's action was not "other legal process" as contemplated by § 407. Although Mason's claim fails on that basis alone, the Court will also address the parties' other arguments with respect to whether *Tidwell* required RSH to get Mason's consent before using her benefits to pay for her maintenance.[5]

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[5] Both *Philpott* and *Bennett* are also distinguishable because in both cases, states were attempting to reach benefits in ways expressly prohibited by § 407. *King,* 940 F.2d at 1185. In *Philpott,* the Supreme Court held that a state could not file suit to reach such benefits. In *Bennett,* a case involving prisoners, the Court held that there was no implied exception to § 407 that would allow a state to attach such benefits simply because it had provided care and maintenance. *Id.* In Mason's case, RSH has not filed suit nor attempted to attach her benefits.

2. Should *Tidwell* Apply To Mason's Case?

The State argues that *Tidwell* is distinguishable because in that case the State of Illinois was not a representative payee for the patients who signed the Form 623 at issue.[6] This argument has some merit. In *Tidwell,* the Seventh Circuit held that form 623, which was used only for beneficiaries who were determined to have been competent, violated § 407 because the State did not obtain the beneficiaries' voluntary consent before applying their Social Security benefits to the cost of their maintenance. Mason contends that the same rule should apply here, where the State is a representative payee.

The reasoning of *Tidwell,* however, is not necessarily applicable to Mason's situation because the SSA has already determined that she is incapable of managing her benefits. In other words, after an opportunity to be heard thereon, the SSA found that Mason is unable to make logical and reasonable decisions with respect to the use of

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[6] In arguing that it should be allowed to recover its costs, the State also relied upon *Department of Health and Rehabilitative Services, State of Fla. v. Davis,* 616 F.2d 828, 830 (5th Cir. 1980), which distinguished *Philpott* in allowing the State to apply Social Security benefits to the cost of maintenance. *Davis* noted that in *Philpott* the State provided for only part of the needs of the recipient, while in *Davis* the State provided for all of the needs. The Court agrees with Mason that the Supreme Court has found the distinction relied upon in *Davis* to be unpersuasive in light of the language of § 407 and the clear intent of Congress that Social Security benefits not be attachable. *See Bennett,* 485 U.S. at 397-398. *See also, Ecolono v. Division of Reimbursements of the Dept. of Health and Mental Hygiene,* 769 A.2d 296 (Md. App. 2001) (noting that *Bennett* "refused to accept the *Davis* distinction.").

her benefits. In situations like Mason's, the SSA has developed a procedure whereby it appoints a representative payee to make those decisions for the beneficiary. In this case, that happens to be RSH. The SSA notified Mason that it was going to appoint RSH, and gave her an opportunity to object to the appointment, which she apparently did not do. Now that it is the representative payee of Mason, RSH is charged with the responsibility of using her benefits in a manner and for the purposes it deems to be in her best interests. The SSA, through its regulations, has authorized representative payees like RSH to use such benefits for maintenance, including the customary charges of an institution where a beneficiary is receiving care because of a physical or mental capacity.

The Court is not inclined to extend the holding of *Tidwell* to situations where the SSA has appointed a representative payee. It would make no sense to require the State to obtain consent from an individual who has already been deemed incapable of managing his or her own benefits. The Court presumes that one who is incapable of managing his or her benefits would likewise be unable to reasonably determine whether such benefits should be used for his or her maintenance. Moreover, in those cases where the beneficiary is mentally incapacitated, it is doubtful that the State would ever be able to obtain "voluntary" consent. As a result, the Court concludes that RSH, as representative payee of Mason, was not required to obtain Mason's voluntary consent before using a portion of her Social Security benefits to pay for the costs of her maintenance.

B. MASON'S CONSTITUTIONAL CLAIMS

Mason also claims that the loss of control over the use of her benefits amounts to a taking without just compensation in violation of the Fifth Amendment, and violates her right to due process under the Fourteenth Amendment. The Court will briefly address those claims.

The Fifth Amendment prohibits governmental taking of private property "for public use without just compensation." To state a claim of a taking in violation of the Fifth Amendment, Mason must first show she possessed a recognized property interest which may be protected. *Winters v. Mowery,* 836 F.Supp. 1419, 1424 (S.D. Ind. 1993), *citing Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124-25 (1978). Assuming Mason had a property interest in her Social Security benefits, she would also need to establish that there was a "taking." *Winters,* 836 F.Supp. at 1426. The Supreme Court has identified several factors for determining whether a taking has occurred: (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action" – whether the interference with property can be "characterized as a physical invasion by government" or whether the interference "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Pen Central,* 438 U.S. at 124-125. The government may impose regulations to adjust rights and economic interests among people for the public good, as long as the government does not force "some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In this case, the State is not the one that caused Mason to lose control of her benefits. Instead, it was the SSA that determined she was no longer capable of making decisions regarding her benefits. As a result, the SSA appointed RSH as a representative payee, stripping Mason of the right to control her benefits. If Mason had any objection to losing her right to control her benefits, the time for voicing her concern was when the SSA appointed RSH as her representative payee. Now that she no longer possesses that right, she cannot complain that the State – as a representative payee looking out for her best interests – is somehow "taking" her benefits by applying them to the cost of her maintenance. In addition, even if the State had "taken" Mason's property, the Court is persuaded that she received just compensation. Indeed, the State has provided her meals, shelter, and medical care for years. This is sufficient compensation in return for the use of her benefits. Because there is no evidence RSH or the State took any of Mason's property without just compensation, her claim fails as a matter of law.

Mason's due process claim fares no better. In procedural due process claims, "the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000), *citing Doe by Nelson v. Milwaukee County*, 903 F.2d 499, 502 (7th Cir. 1990). Thus, the Court must conduct a two-part analysis: (1) whether

the State deprived Mason of a protected liberty or property interest, and (2) if so, what process was due. *Id.* Again, it was not the State that deprived Mason of her ability to control her benefits. Instead, it was the SSA that eliminated that right when it appointed RSH as her representative payee. The SSA provided Mason with notice of the appointment and gave her an opportunity to object. Mason also had the right to request a reconsideration of the decision. She did neither. The Court concludes that Mason was provided with ample opportunity to protect her right to control the use of her benefits, and that the State did not deny her rights to procedural due process. *See King*, 940 F.2d at 1186 ("Labelling the Department a preferred creditor is something of a misnomer at any rate. For one thing, under federal regulations, the patients receive notice of and may object to the Department's appointment as representative payee. 20 C.F.R. § 404.2030 (1991). Thus, the patients have, in effect, the ability to safeguard their own benefits."). The State is also entitled to summary judgment on Masons' procedural due process claim.

IV. CONCLUSION

Plaintiffs have failed to present sufficient evidence from which the Court could find a genuine issue of material fact on their claims that the State violated the "anti-assignment" provision of the Social Security Act, found at 42 U.S.C. § 407. Plaintiffs have also failed to present evidence from which the Court could find a genuine issue of material fact on their claims that the State violated their rights to procedural due process and took their property without just compensation. Accordingly,

the Court **GRANTS** the State's Motion for Summary Judgment on all claims and **DENIES** Plaintiffs' Motion for Summary Judgment.

IT IS SO ORDERED this 15th day of May, 2001.

/s/ Larry J. McKinney
LARRY J. MCKINNEY,
CHIEF JUDGE
United States
District Court
Southern District
of Indiana

Distributed to:

Jacquelyn B. Suess
Indiana Civil Liberties Union
1031 E. Washington St.
Indianapolis, IN 46202

Laureanne Nordstrom
Office of the Atty General
Indiana Government Center South,
5th Floor, 402 West Washington St.
Indianapolis, IN 46204-2770

42 U.S.C. § 405

* * *

(j) **Representative payees**

(1)(A) If the Commissioner of Social Security determines that the interest of any individual under this subchapter would be served thereby, certification of payment of such individual's benefit under this subchapter may be made, regardless of the legal competency or incompetency of the individual, either for direct payment to the individual, or for his or her use and benefit, to another individual, or an organization, with respect to whom the requirements of paragraph (2) have been met (hereinafter in this subsection referred to as the individual's "representative payee"). If the Commissioner of Social Security or a court of competent jurisdiction determines that a representative payee has misused any individual's benefit paid to such representative payee pursuant to this subsection or section 1007 or 1383(a)(2) of this title, the Commissioner of Social Security shall promptly revoke certification for payment of benefits to such representative payee pursuant to this subsection and certify payment to an alternative representative payee or, if the interest of the individual under this subchapter would be served thereby, to the individual.

(B) In the case of an individual entitled to benefits based on disability, the payment of such benefits shall be made to a representative payee if the Commissioner of Social Security determines that such payment would serve the interest of the individual because the individual also has an alcoholism or drug addiction condition (as

determined by the Commissioner) and the individual is incapable of managing such benefits.

(2)(A) Any certification made under paragraph (1) for payment of benefits to an individual's representative payee shall be made on the basis of –

(i) an investigation by the Commissioner of Social Security of the person to serve as representative payee, which shall be conducted in advance of such certification and shall, to the extent practicable, include a face-to-face interview with such person, and

(ii) adequate evidence that such certification is in the interest of such individual (as determined by the Commissioner of Social Security in regulations).

(B)(i) As part of the investigation referred to in subparagraph (A)(i), the Commissioner of Social Security shall –

(I) require the person being investigated to submit documented proof of the identity of such person, unless information establishing such identity has been submitted with an application for benefits under this subchapter, subchapter VIII of this chapter [42 U.S.C.A. § 1001 et seq.], or subchapter XVI of this chapter [42 U.S.C.A. § 1381 et seq.].

(II) verify such person's social security account number (or employer identification number),

(III) determine whether such person has been convicted of a violation of section 408, 1011, or 1383a of this title, and

(IV) determine whether certification of payment of benefits to such person has been revoked pursuant to this subsection, the designation of such person as a representative payee has been revoked pursuant to section 1007(a) of this title, or payment of benefits to such person has been terminated pursuant to section 1383(a)(2)(A)(iii) of this title by reason of misuse of funds paid as benefits under this subchapter, subchapter VIII of this chapter [42 U.S.C.A. § 1001 et seq.], or subchapter XVI of this chapter.

(ii) The Commissioner of Social Security shall establish and maintain a centralized file, which shall be updated periodically and which shall be in a form which renders it readily retrievable by each servicing office of the Social Security Administration. Such file shall consist of –

(I) a list of the names and social security account numbers (or employer identification numbers) of all persons with respect to whom certification of payment of benefits has been revoked on or after January 1, 1991, pursuant to this subsection, whose designation as a representative payee has been revoked pursuant to section 1007(a) of this title, or with respect to whom payment of benefits has been terminated on or after such date pursuant to section 1383(a)(2)(A)(iii) of this title, by reason of misuse of funds paid as benefits under this subchapter, subchapter VIII of this chapter [42 U.S.C.A. § 1001 et seq.], or subchapter XVI of this chapter, and

(II) a list of the names and social security account numbers (or employer identification numbers) of

all persons who have been convicted of a violation of section 408, 1011 of this title, or 1383a of this title.

(C)(i) Benefits of an individual may not be certified for payment to any other person pursuant to this subsection if –

(I) such person has previously been convicted as described in subparagraph (B)(i)(III),

(II) except as provided in clause (ii), certification of payment of benefits to such person under this subsection has previously been revoked as described in subparagraph (B)(i)(IV), the designation of such person as a representative payee has been revoked pursuant to section 1007(a) of this title, or payment of benefits to such person pursuant to section 1383(a)(2)(A)(ii) of this title has previously been terminated as described in section 1383(a)(2)(B)(ii)(IV) of this title, or

(III) except as provided in clause (iii), such person is a creditor of such individual who provides such individual with goods or services for consideration.

(ii) The Commissioner of Social Security shall prescribe regulations under which the Commissioner of Social Security may grant exemptions to any person from the provisions of clause (i)(II) on a case-by-case basis if such exemption is in the best interest of the individual whose benefits would be paid to such person pursuant to this subsection.

(iii) Clause (i)(III) shall not apply with respect to any person who is a creditor referred to therein if such creditor is –

(I) a relative of such individual if such relative resides in the same household as such individual,

(II) a legal guardian or legal representative of such individual,

(III) a facility that is licensed or certified as a care facility under the law of a State or a political subdivision of a State,

(IV) a person who is an administrator, owner, or employee of a facility referred to in subclause (III) if such individual resides in such facility, and the certification of payment to such facility or such person is made only after good faith efforts have been made by the local servicing office of the Social Security Administration to locate an alternative representative payee to whom such certification of payment would serve the best interests of such individual, or

(V) an individual who is determined by the Commissioner of Social Security, on the basis of written findings and under procedures which the Commissioner of Social Security shall prescribe by regulation, to be acceptable to serve as a representative payee.

(iv) The procedures referred to in clause (iii)(V) shall require the individual who will serve as representative payee to establish, to the satisfaction of the Commissioner of Social Security, that –

(I) such individual poses no risk to the beneficiary,

(II) the financial relationship of such individual to the beneficiary poses no substantial conflict of interest, and

(III) no other more suitable representative payee can be found.

(v) In the case of an individual described in paragraph (1)(B), when selecting such individual's representative payee, preference shall be given to –

(I) a community-based nonprofit social service agency licensed or bonded by the State,

(II) a Federal, State, or local government agency whose mission is to carry out income maintenance, social service, or health care-related activities,

(III) a State or local government agency with fiduciary responsibilities, or

(IV) a designee of an agency (other than of a Federal agency) referred to in the preceding subclauses of this clause, if the Commissioner of Social Security deems it appropriate,

unless the Commissioner of Social Security determines that selection of a family member would be appropriate.

(D)(i) Subject to clause (ii), if the Commissioner of Social Security makes a determination described in the first sentence of paragraph (1) with respect to any individual's benefit and determines that direct payment of the benefit to the individual would cause substantial harm to the individual, the Commissioner of Social Security may defer (in the case of initial entitlement) or suspend (in the case of existing entitlement) direct payment of such benefit to the individual, until such time as the selection of a representative payee is made pursuant to this subsection.

(ii)(I) Except as provided in subclause (II), any deferral or suspension of direct payment of a benefit pursuant to clause (i) shall be for a period of not more than 1 month.

(II) Subclause (I) shall not apply in any case in which the individual is, as of the date of the Commissioner's determination, legally incompetent, under the age of 15 years, or described in paragraph (1)(B).

(iii) Payment pursuant to this subsection of any benefits which are deferred or suspended pending the selection of a representative payee shall be made to the individual or the representative payee as a single sum or over such period of time as the Commissioner of Social Security determines is in the best interest of the individual entitled to such benefits.

(E)(i) Any individual who is dissatisfied with a determination by the Commissioner of Social Security to certify payment of such individual's benefit to a representative payee under paragraph (1) or with the designation of a particular person to serve as representative payee shall be entitled to a hearing by the Commissioner of Social Security to the same extent as is provided in subsection (b) of this section, and to judicial review of the Commissioner's final decision as is provided in subsection (g) of this section.

(ii) In advance of the certification of payment of an individual's benefit to a representative payee under paragraph (1), the Commissioner of Social Security shall provide written notice of the Commissioner's initial determination to certify such payment. Such notice shall

be provided to such individual, except that, if such individual –

(I) is under the age of 15,

(II) is an unemancipated minor under the age of 18, or

(III) is legally incompetent,

then such notice shall be provided solely to the legal guardian or legal representative of such individual.

(iii) Any notice described in clause (ii) shall be clearly written in language that is easily understandable to the reader, shall identify the person to be designated as such individual's representative payee, and shall explain to the reader the right under clause (i) of such individual or of such individual's legal guardian or legal representative –

(I) to appeal a determination that a representative payee is necessary for such individual,

(II) to appeal the designation of a particular person to serve as the representative payee of such individual, and

(III) to review the evidence upon which such designation is based and submit additional evidence.

(3)(A) In any case where payment under this subchapter is made to a person other than the individual entitled to such payment, the Commissioner of Social Security shall establish a system of accountability monitoring whereby such person shall report not less often than annually with respect to the use of such payments.

The Commissioner of Social Security shall establish and implement statistically valid procedures for reviewing such reports in order to identify instances in which such persons are not properly using such payments.

(B) Subparagraph (A) shall not apply in any case where the other person to whom such payment is made is a State institution. In such cases, the Commissioner of Social Security shall establish a system of accountability monitoring for institutions in each State.

(C) Subparagraph (A) shall not apply in any case where the individual entitled to such payment is a resident of a Federal institution and the other person to whom such payment is made is the institution.

(D) Notwithstanding subparagraphs (A), (B), and (C), the Commissioner of Social Security may require a report at any time from any person receiving payments on behalf of another, if the Commissioner of Social Security has reason to believe that the person receiving such payments is misusing such payments.

(E) The Commissioner of Social Security shall maintain a centralized file, which shall be updated periodically and which shall be in a form which will be readily retrievable by each servicing office of the Social Security Administration, of –

(i) the address and the social security account number (or employer identification number) of each representative payee who is receiving benefit payments pursuant to this subsection, section 1007 of this title, or section 1383(a)(2) of this title, and

(ii) the address and social security account number of each individual for whom each representative payee is reported to be providing services as representative payee pursuant to this subsection, section 1007 of this title, or section 1383(a)(2) of this title.

(F) Each servicing office of the Administration shall maintain a list, which shall be updated periodically, of public agencies and community-based nonprofit social service agencies which are qualified to serve as representative payees pursuant to this subsection or section 1007 or 1383(a)(2) of this title and which are located in the area served by such servicing office.

(4)(A)(i) A qualified organization may collect from an individual a monthly fee for expenses (including overhead) incurred by such organization in providing services performed as such individual's representative payee pursuant to this subsection if such fee does not exceed the lesser of –

(I) 10 percent of the monthly benefit involved, or

(II) $25.00 per month ($50.00 per month in any case in which the individual is described in paragraph (1)(B)).

The Commissioner of Social Security shall adjust annually (after 1995) each dollar amount set forth in subclause (II) under procedures providing for adjustments in the same manner and to the same extent as adjustments are provided for under the procedures used to adjust benefit amounts under section 415(i)(2)(A) of this title, except

that any amount so adjusted that is not a multiple of $1.00 shall be rounded to the nearest multiple of $1.00.

Any agreement providing for a fee in excess of the amount permitted under this subparagraph shall be void and shall be treated as misuse by such organization of such individual's benefits.

(ii) In the case of an individual who is no longer currently entitled to monthly insurance benefits under this subchapter but to whom all past-due benefits have not been paid, for purposes of clause (i), any amount of such past-due benefits payable in any month shall be treated as a monthly benefit referred to in clause (i)(I).

(B) For purposes of this paragraph, the term "qualified organization" means any State or local government agency whose mission is to carry out income maintenance, social service, or health care-related activities, any State or local government agency with fiduciary responsibilities, or any community-based nonprofit social service agency which is bonded or licensed in each State in which it serves as a representative payee, if such agency, in accordance with any applicable regulations of the Commissioner of Social Security –

(i) regularly provides services as the representative payee, pursuant to this subsection or section 1007 or 1383(a)(2) of this title, concurrently to 5 or more individuals,

(ii) demonstrates to the satisfaction of the Commissioner of Social Security that such agency is not otherwise a creditor of any such individual.

(iii) Repealed. Pub.L. 103-296, Title II, § 201(a)(2)(B)(ii)(IV), Aug. 15, 1994, 108 Stat. 1493

The Commissioner of Social Security shall prescribe regulations under which the Commissioner of Social Security may grant an exception from clause (ii) for any individual on a case-by-case basis if such exception is in the best interests of such individual.

(C) Any qualified organization which knowingly charges or collects, directly or indirectly, any fee in excess of the maximum fee prescribed under subparagraph (A) or makes any agreement, directly or indirectly, to charge or collect any fee in excess of such maximum fee, shall be fined in accordance with title 18, or imprisoned not more than 6 months, or both.

(D) Repealed. Pub.L. 103-296, Title II, § 201(a)(2)(B)(iii), Aug. 15, 1994, 108 Stat. 1493

(5) In cases where the negligent failure of the Commissioner of Social Security to investigate or monitor a representative payee results in misuse of benefits by the representative payee, the Commissioner of Social Security shall certify for payment to the beneficiary or the beneficiary's alternative representative payee an amount equal to such misused benefits. The Commissioner of Social Security shall make a good faith effort to obtain restitution from the terminated representative payee.

(6) The Commissioner of Social Security shall include as a part of the annual report required under section 904 of this title information with respect to the

implementation of the preceding provisions of this subsection, including the number of cases in which the representative payee was changed, the number of cases discovered where there has been a misuse of funds, how any such cases were dealt with by the Commissioner of Social Security, the final disposition of such cases, including any criminal penalties imposed, and such other information as the Commissioner of Social Security determines to be appropriate.

(7) For purposes of this subsection, the term "benefit based on disability" of an individual means a disability insurance benefit of such individual under section 423 of this title or a child's, widow's, or widower's insurance benefit of such individual under section 402 of this title based on such individual's disability.

* * *